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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND SAMUEL E. WHITAKER, J. WARREN MADDEN, DON N. LARAMORE AND JAMES R. DURFEE, JUDGES OF THE UNITED STATES COURT OF CLAIMS, AS AMICI CURIAE

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Interest of Amici Curiae

This brief is being filed pursuant to Rule 42 with the written consent of both petitioner and respondent. The Judges of the Court of Claims are not concerned with a

number of the issues raised by the parties and express no views about those issues. The Judges of the Court of Claims have a real interest, however, in the issues concerning the validity of the assignment of a retired judge of the Court of Customs and Patent Appeals to serve as a judge of the United States District Court for the District of Columbia. The resolution by this Court of those issues may well be virtually determinative with respect to similar issues concerning the status of the Court of Claims and of its member Judges.

The status of the Court of Claims as a constitutional court under Article III had appeared to be settled until *Ex Parte Bakelite Corporation*, 279 U. S. 438, 452-455, in the course of holding that the Court of Customs Appeals was a legislative court, expressed the view that the Court of Claims was a legislative court. This *dictum* in *Bakelite* was converted into a holding by *Williams v. United States*, 289 U. S. 553, 577, where it was pointed out that "neither by brief nor in argument here is any serious attempt made to differentiate, in respect of the question now being considered, between the Court of Claims and the Court of Customs Appeals; and we have been unable to discover any ground for such a differentiation."

One of the issues now before this Court concerns the validity and effect of a 1958 statute, 72 Stat. 848, 28 U.S.C. 211, as amended, which declares the United States Court of Customs and Patent Appeals "to be a court established under article III of the Constitution of the United States." Both petitioner and respondent, in their briefs, have noted that this statute was patterned after and had the same purpose as a 1953 statute, 67 Stat. 226, 28 U.S.C. § 171, as amended, which declares the United States Court of Claims "to be a court established under article III of the Constitution of the United States." The parties have relied in large measure upon the legislative history of the 1953

statute with respect to the Court of Claims as support for their respective contentions concerning the purpose and effect of the 1958 statute with respect to the Court of Customs and Patent Appeals.

That legislative history unmistakably reveals the purpose of the 1953 Act, as follows: "By Congress declaring unequivocally, as this bill proposes, that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."[1] The bill which was enacted to accomplish this purpose was supported by the Judicial Conference of the United States,[2] and judges appointed to other courts, including retired Justices of this Court, have since been temporarily assigned to the Court of Claims, while judges of the Court of Claims have also been assigned to other courts.

A decision in this case, therefore, as to the validity of a temporary assignment of a judge of the Court of Customs and Patent Appeals to another court, and as to the status of the Court of Customs and Patent Appeals as a constitutional or legislative court, must necessarily be of the largest significance in the determination of similar issues with respect to the Court of Claims. Furthermore, we believe that this Court may be aided in deciding these issues with respect to the Court of Customs and Patent

[1] H. Rept. No. 695, 83d Cong., 1st Sess., 1953 U.S. Code Cong. and Adm. News 2006.

[2] Report of the Judicial Conference of the United States, September 22-24, 1949, p 19; H. Rept. No. 695, *supra*, 1953 U.S. Code Cong. and Adm. News 2006, 2013 2014.

Appeals by a more complete exploration of them in the context of the Court of Claims than is now before the Court. It is for this reason that the Judges of the Court of Claims have obtained the consent of the parties to appear as *amici curiae*.

We recognize that there are other issues in this case, and that it may be possible for this Court to dispose of the case without reaching the matters with which we are concerned. And, we are of course aware of the established practice of avoiding decision of broad constitutional issues where more limited non-constitutional grounds are available as a basis for decision. In the ordinary case, this is undoubtedly a salutary rule which comports with the administration of justice. We urge, however, the importance of a decision at this time by this Court of the issues concerning the status of the Court of Customs and Patent Appeals as a constitutional or legislative court and the validity of the assignment of a judge of that Court to another constitutional court.[3]

The provisions of the Constitution here concerned are not broad grants of power affecting the general operation of the Government. As observed by Mr. Justice Frankfurter, dissenting in *National Ins. Co. v. Tidewater Co.*, 337 U. S. 582, 654, "The very subject-matter of §§ 1 and 2 of Article III is technical in the esteemed sense of that term. These sections do not deal with generalities expanding with experience. Provisions for the organization of courts and their jurisdiction presuppose definiteness

[3] In the *Baltzly* case, this Court decided the issue concerning the status of the Court of Customs Appeals as a "constitutional" or legislative court in preference to an unresolved issue concerning the propriety of issuing a writ of prohibition as sought by the petitioner in that case, 279 U.S., at p. 448, and in the face of the unquantified statement by Attorney General Mitchell that the Court of Customs Appeals was a constitutional court, 279 U. S., at pp. 445-446.

and precision of phrasing." Those are not issues, there is necessarily desirable.

Furthermore, where, as here, the constitutional issues directly involve the proper administration of justice in its most narrow sense, a refusal promptly to decide such issues when the opportunity arises can hardly be in the interest of the administration of justice. "If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation affecting the jurisdiction of the federal courts." *National Ins. Co.* v. *Tidewater Co.*, *supra*, at p. 655 (dissenting opinion of Mr. Justice Frankfurter). We see no advantage that can be derived from further delay in deciding whether judges of the Court of Customs and Patent Appeals (and by inference of the Court of Claims) can be assigned to other constitutional courts. The continued existence of doubts about this practice can only impair the confidence of the public in our judicial system, and render suspect the validity of decisions made or participated in by assigned judges. If the existing practice is wrong, certainly it should be stopped as soon as possible. If it is entirely proper, as we believe, then much needless controversy will be avoided by making that clear in the decision of this case.

Summary of Argument

The Court of Claims was constituted in substantially its present form during the eleven-year period between 1855 and 1866. The history of this early legislation demonstrates that the Congress created the Court of Claims pursuant to Article III of the Constitution as a constitutional court. Proposals to establish a board of commissioners rather than a court were defeated, and the judges of the Court of Claims were given life tenure during good be-

havior. When it became apparent that statutory provisions making judgments of the Court of Claims subject to congressional and administrative review prevented appeal from such judgments to the Supreme Court, the Congress promptly amended the statutes to remove those provisions. After the last such amendment in 1866, this Court amended its rules to provide for appeals from judgments of the Court of Claims and has since reviewed such judgments on innumerable occasions. In 1871, this early history of the Court of Claims was reviewed in *United States* v. *Klein*, 13 Wall. 128, 144-145. This Court there stated that "the Court of Claims has exercised all the functions of a court" and "is thus constituted one of those inferior courts which Congress authorizes" once the legislative and administrative review of its judgments had been removed.

On a number of subsequent occasions, this Court reasserted the view that the Court of Claims had been created as a constitutional court under Article III. At no time during this period did the Congress express any disagreement or attempt to change the status of the Court of Claims to that of a legislative court. Indeed, the Congress reenacted the basic jurisdictional statute of the Court of Claims in 1887 as part of the Tucker Act, which also conferred concurrent jurisdiction on the federal district courts. This reenactment occurred only eight years after this Court, in *United States* v. *Union Pacific R. Co.*, 98 U.S. 569, 603, had again asserted the view that the Court of Claims had been created under Article III. It is an established rule that the Congress in reenacting a statute is presumed to have adopted the interpretation given to the prior statute.

Nevertheless, the *Bakelite* case, in 1929, stated in *dicta* that the Court of Claims was a legislative court, and the

Williams case, in 1933, so held. We believe that these decisions were in error, and should be reconsidered by this Court. They disregarded the plain intent of the Congress and departed from the view which had seemed to be settled by this Court for more than 60 years. In addition, the *Williams* case held Article III of the Constitution in extending the judicial power to "controversies to which the United States shall be a party" does not mean what it plainly says, but rather applies only to controversies in which the United States is a party plaintiff. The contrary holding in *Minnesota* v. *Hitchcock*, 185 U.S. 373, 384-386, was overruled. The principal reason given in the *Williams* opinion for this holding was that the draftsmen of the Constitution did not contemplate the possibility that the United States might be a party defendant because of its sovereign immunity from suit. However, there is good reason to believe that the draftsmen of the Constitution recognized that the United States could waive its sovereign immunity and consent to be sued.

The Solicitor General, who had urged the result in *Williams*, later requested this Court to reexamine and overrule that decision, in *Pope* v. *United States*, 323 U.S. 1. This Court did not deem that course to be necessary for the decision in the *Pope* case, but also refrained from reaffirming the *Williams* decision and stressed the similarity between the Court of Claims and the District of Columbia courts, which have been held to be constitutional courts.

In 1953, the Congress enacted a statute declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." The legislative history of that statute demonstrates that the Congress thoroughly examined the problem, and concluded that *Williams* had been wrongly decided. This conclusion by the Congress is entitled to great weight, even though not bind-

ing insofar as the interpretation of prior statutes is concerned, and in itself justifies a reconsideration by this Court of the result in the *Williams* case.

Furthermore, the 1953 Act would seem to establish conclusively that the Court of Claims has been a constitutional court since 1953. The cases make clear that the establishment and jurisdiction of both federal constitutional courts and federal legislative courts is a matter primarily for determination by the Congress. This being true, determination of whether a particular court has been established as a constitutional court under Article III or a legislative court under Article I must depend upon the intent of the Congress.

The Congress has expressly stated its intention in the 1953 Act that the Court of Claims be a constitutional court established under Article III. While this was done in the form of a declaration that the Court of Claims had originally been created under Article III, that declaration is entitled to future effect even if the Congress was mistaken about this. *Postmaster-General* v. *Early*, 12 Wheat. 136, 148-149.

The status of the Court of Claims as a constitutional court does not raise any serious question about the great bulk of its traditional jurisdiction. The district courts, which have always been considered to be constitutional courts, have long exercised concurrent jurisdiction with the Court of Claims over claims against the United States founded upon the Constitution, statutes, and express or implied contracts. There may be some doubt as to whether the Court of Claims, as a constitutional court, can be required to accept jurisdiction of congressional reference cases. These doubts were brought to the attention of the Congress when the 1953 Act was under consideration, however, and the Congress elected to declare the Court of Claims to be a constitutional court with this knowledge.

We believe that the Court of Claims has always been a constitutional court, but if it were a legislative court prior to the 1953 Act the change in status effected by that Act did not necessitate reappointment of the judges of the Court of Claims. No change was made in their duties, and they were appointed by the President, confirmed by the Senate and serve during good behavior, as required by the Constitution.

ARGUMENT

I

The Court of Claims Was Created As A Constitutional Court

The Solicitor General, in his brief, has invited this Court to reexamine the holding in the *Bakelite* case, and has persuasively argued the view that the Court of Customs and Patent Appeals was created as and has always been a constitutional court. We join in this request by the Solicitor General, and we are in accord with his views. If *Bakelite* is overruled the similar decision in the *Williams* case can hardly stand. As we noted at the outset, *Williams* relied heavily on the *Bakelite* decision, expressing the view that the situation of the two courts concerned could not be differentiated for purposes of determining their status as constitutional or legislative courts. Moreover, the opinion in the *Bakelite* case devoted considerable attention to the Court of Claims, utilizing a conclusion that the Court of Claims was a legislative court to support the holding that the Court of Customs Appeals had that status. In view of this interrelation between the status of the two courts and between the *Bakelite* and *Williams* decisions, we think it may be helpful to this Court to indicate the reasons that lead us to believe that *Williams* was wrongly decided and that the Court of Claims was

created as a constitutional court under Article III of the Constitution.

1. The status of the Court of Claims in the governmental hierarchy was developed and, it was supposed, determined during the first eleven years of its existence. The bill initially introduced, in 1854, proposed the establishment of a board of three commissioners (Cong. Globe, 33d Cong., 2d Sess., p. 71); but after debate in the Senate (*id.*, at pp. 71-73) the bill was referred to a special committee, which reported back an amended bill providing for a "Court of Claims" of three judges holding office during good behavior (*id.*, at pp. 105-106). Senator Weller proposed an amendment to create a "board of commissioners" rather than a court, so that the tenure of the members could be limited to a fixed term (*id.*, at p. 107), but this amendment was rejected after considerable debate (*id.*, at pp. 107-114). It is fairly apparent from these debates that the alternatives were assumed to be a court exercising judicial power under Article III or a non-judicial board of commissioners. Nothing was said about the establishment of a legislative court under Article I even though the legislative court doctrine had been broached some 27 years previously in *American Ins. Co.* v. *Canter*, 1 Peters 511, 546.

The bill which became law on February 24, 1855, 10 Stat. 612, did not give finality to the decisions of the court, but made such decisions subject to review and approval by the Congress. President Lincoln recommended that the decisions of the court be made final, stating that the "investigation and adjudication of claims, in their nature belong to the judicial department" and should be removed from the legislature. Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess. The Congress enacted a statute, 12 Stat. 763, intended to make the judgments of the court final and to provide for appeals to the Supreme Court, but also in-

cluded a provision that no money should be paid out of the treasury on any claim adjudicated by the Court of Claims until an appropriation therefor had been estimated by the Secretary of the Treasury. Because of this administrative review to which the judgments of the court were subjected, *Gordon* v. *United States*, 2 Wall. 561, dismissed for want of jurisdiction an attempted appeal to the Supreme Court from a judgment of the Court of Claims. An elaborate opinion prepared by Chief Justice Taney, who died before the decision of the case, was later published in 117 U.S. 697.

This initial eleven-year period in the creation of the Court of claims was completed in 1866, shortly after the decision in the *Gordon* case, when the Congress repealed the objectionable provision for administrative review (14 Stat. 9) and this Court amended its rules to provide for appeals from judgments of the Court of Claims (3 Wall. VII-VIII). Following these amendments to the statute and to this Court's rules, the Supreme Court took jurisdiction of the first appeal from a judgment of the Court of Claims, *De Groot* v. *United States*, 5 Wall. 419, and, of course, has since taken jurisdiction of countless appeals from such judgments. Chief Justice Taney, in his opinion in the *Gordon* case, stated that "this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court." 117 U. S., at p. 704. The acceptance by the Supreme Court of appeals from judgments of the Court of Claims, viewed in the light of this basis for the initial rejection of such appeals, certainly indicates a belief that the Court of Claims was an

inferior court established under Article III to exercise the judicial power of the United States.

This early history of the Court of Claims, and the significance given to that history at the time, is well expressed in *United States* v. *Klein*, 13 Wall. 128, 144-145, where this Court, some six years after the *Gordon* decision, said:

> "It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfill its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefitting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. Originally, it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.
>
> "In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress; it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of the opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. *Since then the Court of Claims*

has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"*The Court of Claims is thus constituted one of those inferior courts which Congress authorizes,* and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court." (Italics supplied.)

The above recital shows that the Congress in the first eleven years of the existence of the Court of Claims was constantly motivated by the purpose of constituting the Court of Claims as a true Article III court, acting promptly to correct deficiencies in the basic statute which were found to interfere with this purpose. The judges of the Court of Claims were given life tenure during good behavior, and at no time did the Congress indicate anything other than a purpose to create a constitutional court under Article III. This Court recognized that the Congress had accomplished its purpose once all legislative and administrative review of judgments of the Court of Claims had been eliminated, and accepted jurisdiction of appeals from such judgments. We submit, therefore, that the creation of the Court of Claims as a constitutional court under Article III was intended by the Congress, and that this intent received early recognition by the Supreme Court.

2. On numerous subsequent occasions, this Court expressed the view that the Court of Claims had been created and existed under Article III as a regular constitutional court. In *United States* v. *Union Pacific R. Co.*, 98 U. S. 569, 603, this Court stated that:

"Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Con-

stitution. It has also regulated the appellate jurisdiction of the Supreme Court."

In *United States* v. *Louisiana*, 123 U.S. 32, an objection was raised to the jurisdiction of the Court of Claims over a suit brought by a State against the United States. Rejecting that objection, this Court first quoted the pertinent language of Article III (p. 35), and then held (p. 35) that:

> "The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is a petitioner draws it within the original jurisdiction of the Supreme Court."

See, also, *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; *Kansas* v. *United States*, 204 U.S. 331, 342. In *Miles* v. *Graham*, 268 U.S. 501, this Court held that to impose an income tax upon the salary of a judge of the Court of Claims was "forbidden by the Constitution." This reference to the Constitution must have been to the provision in Article III that the compensation of judges of courts established pursuant to that Article "shall not be diminished during their Continuance in Office."

Throughout this period of some 60 years during which the status of the Court of Claims as a constitutional court seemed to be settled, the Congress never took any action to change its status to that of a legislative court. Rather, the Congress in 1887 reenacted the basic jurisdiction of the

Court of Claims as a part of the Tucker Act, 24 Stat. 505, and at the same time extended concurrent jurisdiction over the same claims (up to $10,000) to the federal district courts, which have never been considered to be anything other than constitutional courts. The Tucker Act was adopted only eight years after this Court, in *United States* v. *Union Pacific R. Co.*, *supra*, had expressly referred to the Court of Claims as having been created under Article III. The House Report on the bill enacted as the Tucker Act pointed out the advantages of having a court of justice ascertain rights as between litigants, and stated that it was proposed to extend the jurisdiction of the Court of Claims to include certain claims which "should be asserted before a judicial and not a legislative tribunal." The Report also added that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." H. Rept. No. 1077, 49th Cong., 1st Sess., pp. 4, 5.

It is, of course, an established rule that the Congress in reenacting a statute is presumed to have adopted the construction given to the same language in the prior statute. See, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited. In reenacting the statutes governing the jurisdiction of the Court of Claims as a part of the Tucker Act, the Congress must, therefore, have intended to adopt the then settled view that the Court of Claims exercised this jurisdiction under Article III of the Constitution and to continue the Court of Claims in existence as a constitutional court.

3. Despite this imposing body of authority, *dicta* in the *Bakelite* case expressed the view that the Court of Claims was a legislative court. The principal authorities cited to support this view were two cases in which this Court had refused to review judgments of the Court of Claims because they were subject to administrative review. See

279 U.S., at pp. 454-455. Neither of those decisions had characterized the Court of Claims as a legislative court, and, as previously noted, this Court had consistently reviewed judgments of the Court of Claims where not subject to legislative or administrative review. This *dictum* in *Bakelite* was, of course, converted into a holding by the *Williams* decision, rendered in 1933.

With all deference, but with the frankness which the subject demands, we suggest that the observations of the Court in *Bakelite* and its decision in *Williams* were seriously in error. The *Williams* decision seriously affected an important judicial tribunal, and upon dubious reasoning. The consistent expressions by this Court over a period of many years that the Court of Claims was a constitutional court were discarded as having been made "more or less irrelevantly," and the intent of the Congress was not examined. Furthermore, *Williams* held, for the first time, that the language of Article III, section 2, extending the judicial power "to controversies to which the United States shall be a party," should not be given its plain meaning and should be limited to controversies to which the United States shall be a party *plaintiff*.

This construction of "controversies to which the United States shall be a party" had previously been considered and rejected in *Minnesota* v. *Hitchcock*, *supra*. This Court there stated that:

> "This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff

and does not extend to those cases in which it is a party defendant. [185 U.S., at p. 384]

. . . . . .

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." [185 U.S., at p. 186]

The same view was again expressed by this Court in *Kansas v. United States*, *supra*, at p. 342.

The most tangible reason given by the *Williams* opinion for overruling the *Hitchcock* case and rewriting the plain language of the Constitution is that because of the sovereign immunity of the United States from suit the draftsmen of the Constitution did not contemplate the possibility that the United States might be a party defendant.[3a] But as is

[3a] *Williams* also relied upon the fact that the provision relating to "controversies to which the United States shall be a party" omitted the word "all" which is found in the provisions relating to certain other categories, such as "all cases of admiralty and maritime jurisdiction." 289 U.S., at pp. 572-573. Mr. Justice Story, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 334-335, pointed out that: "In respect to the first class, it may well have been the intention of the framers of the constitution, imperatively to extend the judicial power, . . . to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." Thus, "although it might be fit, that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognisance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply."

See, also, II Story on the Constitution, §1675, p. 459 (4th ed.).

shown by the statements made by Madison and Marshall in the Virginia Convention, quoted in *Monaco* v. *Mississippi*, 292 U.S. 313, 323-324, informed persons of those times were completely familiar with the idea that sovereign powers might waive their immunity from suit and consent to be sued. Madison and Marshall said in so many words, with relation to the subject there under discussion, that if a State did consent to be sued Article III lodged the jurisdiction of the suit in the United States courts. It is difficult to believe that the enlightened men of that age did not recognize the same possibility with respect to consent by the United States to be sued in its own courts. Appendix B to the Brief for the United States filed in *Pope* v. *United States*, 323 U.S. 1, covers in detail the development of the concept of waiver of sovereign immunity, and demonstrates that this concept was well established both in English law and in the American States at the time of the adoption of the Constitution.

4. In *Pope* v. *United States*, *supra*, the Solicitor General invited this Court to reexamine and overrule its decision in the *Williams* case. Although this Court did not accept the invitation, it is significant that the Court did not reaffirm *Williams* and relied heavily upon the similarity between the Court of Claims and the District of Columbia courts." 323 U.S., at pp. 13-14. The latter courts were held to be constitutional courts in *O'Donoghue* v. *United States*, 289 U.S. 516, which was decided on the same day as the *Williams* case.

5. We have already referred to the 1953 Act declaring the Court of Claims "to be a court established under article III of the Constitution of the United States," and to the House Report with respect thereto expressing the view that the Court of Claims "was in fact established as, and continues to be, a constitutional court." We shall demonstrate, in the next part of this brief, that the declaration by the Congress in the 1953 Act is determinative of

the status of the Court of Claims for the period after the enactment of that statute. While an expression by a later Congress of its views is "not conclusive" insofar as the intent of an earlier Congress in enacting a statute is concerned, it is "entitled to great respect." *United States* v. *Clafin*, 97 U.S. 546, 548. See, *e.g.*, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 310-313; *N. Y. & Norfolk R. R.* v. *Peninsula Exchange*, 240 U.S. 34, 39. The House Report demonstrates that the matter was thoroughly considered by the Congress, which reached the conclusion that the *Williams* case was wrong and that Congress in creating the Court of Claims and thereafter had intended it to be a constitutional court under Article III. H. Rept. No. 695, *supra*, 1953 U. S. Code Cong. and Adm. News 2006-2012. At the very least, this considered judgment by the Congress should justify a reconsideration by this Court of the ruling in the *Williams* case.

II

The Status of the Court of Claims As A Constitutional Court Since the 1953 Act Cannot Validly Be Questioned

The 1953 and 1958 Acts declaring the Court of Claims and the Court of Customs and Patent Appeals to have been established as constitutional courts under Article III obviously present no problem if this Court agrees with the views expressed in part I of this brief and overrules the *Williams* and *Bakelite* cases. In those circumstances, the temporary assignment of judges of the two courts to other constitutional courts, and the temporary assignment to the two courts of judges appointed to other constitutional courts, can unquestionably be done as the Congress intended. The Solicitor General, in his brief, has concentrated primarily on the effect of the 1958 Act on the status of Judge Jackson, and thus has argued that the legisla-

tion conferred Article III status on the judges of the Court of Customs and Patent Appeals, whatever may have been the effect of the legislation upon the status of the court itself. While we are in substantial agreement with this argument, we are also convinced that the 1953 and 1958 Acts fixed the status of the Court of Claims and the Court of Customs and Patent Appeals as constitutional courts even if—contrary to our view—they were legislative courts prior to those Acts.

Mr. Justice Rutledge, concurring in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 604-605, referred to "all of the contradictions, complexities and subtleties which have surrounded the courts of the District of Columbia in the maze woven by the 'legislative court—constitutional court' controversy running through this Court's decisions concerning them." The four opinions in that case, none of which spoke for a majority of the Court, lend substance to this description as well as forcefully expressing some of the views that have developed concerning this problem. But despite the "contradictions, complexities and subtleties" encountered in this area of the law, certain fundamental principles appear to be well defined.

Section 1 of Article III of the Constitution provides that the "judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And section 2 of Article III provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party," among others. No one questions the fact that Article III does not in itself establish a system of courts (except for this Supreme Court) or automatically confer jurisdiction upon court established pursuant to the Article. Rather, the Congress has the power to de-

cide what courts are to be established under Article III and the extent of the jurisdiction to be exercised by such courts,[4] at least within the limits imposed by Article III.[5]

By expressly providing in Article III for the vesting of the judicial power of the United States in courts established under that Article, it would seem that the framers of the Constitution intended that Article to be the exclusive source of judicial power, with the judicial system being limited to courts established thereunder and exercising jurisdiction within the limits prescribed by Article III. And, there is a considerable body of contemporaneous evidence supporting this view.[6] Nevertheless, *American Insurance Co.* v. *Canter*, 1 Peters 511, 546, held that the Congress could create so-called "legislative courts" under Article I of the Constitution to exercise judicial power, and this doctrine has continued to persist. It is clear, however, that the establishment and jurisdiction of federal legislative courts, like the establishment and jurisdiction of federal constitutional courts, is a matter primarily for determination by the Congress.

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[4] See, *e. g.*, *Lockerty* v. *Phillips*, 319 U.S. 182, 187; *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330; *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 233-234.

[5] It has often been said that constitutional courts established under Article III cannot be required by the Congress to exercise jurisdiction of a kind not specified in Article III. *E.g.*, *Radio Comm.* v. *General Electric Co.*, 281 U.S. 464, 469; *Hayburn's Case*, 2 Dallas 409, 410. This limitation has been held to be inapplicable to the District of Columbia courts, *O'Donoghue* v. *United States*, 289 U.S. 516, and perhaps with respect to other courts in some circumstances. See the opinion of Mr. Justice Jackson in the *Tidewater Co.* case, 337 U.S., at pp. 588-600. The *Williams* case, in attempting to justify its holding that the Court of Claims is a legislative court even though its basic jurisdiction is concurrent with the federal district courts and its decisions subject to review by this Court, expressed the view that judicial power apart from that arising under Article III may be conferred "upon constitutional courts" as well as legislative courts. 289 U.S., at p. 565.

[6] See the concurring opinion of Mr. Justice Rutledge and the dissenting opinions of Chief Justice Vinson and Mr. Justice Frankfurter in the *Tidewater Co.* case, 337 U.S., at pp. 615-616, 627-634, 647-654.

The problems arise in determining whether a particular court created by the Congress was established under Article III as a constitutional court or under Article I as a legislative court. We submit that this determination should turn upon the intent of the Congress, just as is true with respect to any other problem of statutory construction. As stated in the House Report on the bill which became the 1953 Act, "it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power."[7] This would seem to be a self-evident proposition but for a *dictum* in *Ex Parte Bakelite Corporation*, 279 U.S. 438, 459.

An argument was made in *Bakelite* that the Congress "intended the Court of Customs Appeals to be a constitutional court because the members of the court were not limited to a fixed term, and the Congress had followed a practice of distinguishing between constitutional and legislative courts "by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter." 279 U.S., at p. 459. In rejecting this argument as fallacious, the opinion in *Bakelite* states that the argument "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." *Ibid.* The Court then went on to point out that the practice relied upon as the basis for this argument did not in fact exist. *Ibid.* No authority was cited for this *dictum*, and we know of none apart from the *Bakelite* case itself. Furthermore, the asserted true test of the "power under which the court was created" merely restates the basic issue, and would appear to neces-

[7] H. Rept. No. 695, *supra*, 1953 U.S. Code Cong. and Adm. News, at p. 2009.

stitute an inquiry into what the Congress intended to be the power under which it created the court.

But whether the test be stated in terms of the intent of the Congress or in terms of the power under which it acted, the answer has been clear since 1953 at least. The Congress, by the statute enacted in that year, expressly "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States." And, as previously noted, a similar express statutory declaration was made in 1958 with respect to the Court of Customs and Patent Appeals.[8] Whatever may have been the situation prior to those statutes, certainly the Congress since their enactment has declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts, and the power under which those courts have existed since 1953 and 1958, respectively, has been Article III of the Constitution.

It is true, as the committee reports demonstrate, that the Congress by this legislation intended to express the view that the courts in question had originally been created and have always been constitutional rather than legislative courts. But even if that view was mistaken and the expression of it ineffectual insofar as the past status of the courts is concerned, that does not prevent the declaration of the Congress from being given effect in the future. This was decided in *Postmaster-General* v. *Early*, 12 Wheat. 136, 148-149, where this Court held, in an opinion by Chief Justice Marshall, that:

> "It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law,

[8] Similar legislation was also enacted with respect to the United States Customs Court in 1956. 70 Stat. 532, 28 U.S.C. § 251, as amended.

does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

See also, *United States* v. *Clafin*, 97 U.S. 546, 548-549. Certainly, the 1953 and 1958 Acts express the sense of the Congress that the Court of Claims and the Court of Customs and Patent Appeals are constitutional courts, and indeed are declaratory acts to that effect, in language capable of being given future effect.

We may note that there cannot be any serious question about the constitutionality of the exercise by the Court of Claims of the great bulk of its traditional jurisdiction, if its status be that of a constitutional court existing under Article III. The district courts, which are indisputably constitutional courts, have long exercised concurrent jurisdiction with the Court of Claims over claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounded in tort." 28 U.S.C. §§ 1346(a)(2), 1491. The Court of Claims review of the Indian Claims Commission (25 U.S.C. § 70s) differs in no essential way from the review exercised by the courts of appeals over numerous administrative agencies. Furthermore, this Court, which is an Article III constitutional court, has constantly exercised jurisdiction to review the judgments of the Court of Claims with respect to these matters from

the year 1866 on. See, *e.g.*, *Pope* v. *United States*, 323 U.S. 1, 13.[9]

There may be some doubt as to whether the Congress can continue to require the Court of Claims, as a constitutional court, to accept congressional reference cases for purposes of a report thereon to the Congress. 28 U.S.C. § 1492. Such cases might be considered to be advisory rather than judicial in nature, and for that reason to be beyond the power of the Congress to impose upon a constitutional court. See *In re Sanborn*, 148 U.S. 222; *Gordon* v. *United States*, 117 U.S. 697. But even as to these cases, it would seem to be equally permissible for the Congress to impose advisory functions on the Court of Claims as on the District of Columbia courts which are constitutional courts. See *O'Donoghue* v. *United States*, *supra*; *Pope* v. *United States*, *supra*, at pp. 13-14. In any event, the doubts about this matter were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,[10] and Senator Gore discussed this problem during the Senate debates. 99 Cong. Rec. 8943-8944. Thus, the Congress by enacting the 1953 Act elected to remove any doubt as to the status of the Court of Claims as a constitutional court regardless of whether its jurisdiction over congressional reference cases was affected.

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[9] The jurisdiction thus conferred upon the Court of Claims by 28 U.S.C. § 1491 would seem to come within the provision of section 2 of Article III extending the judicial power to cases arising under the Constitution and laws of the United States. Jurisdiction over claims based upon express or implied contracts extends only to those contracts authorized by statute. See, *e.g.*, *Eastern Extension Tel. Co.* v. *United States*, 251 U.S. 355. See, also, the opinion of Mr. Justice Frankfurter in the *Tidewater Co.* case, 337 U.S., at p. 649. In addition, Article III jurisdiction over "controversies to which the United States shall be a party" would seem, on its face, to include suits in the Court of Claims to which the United States is necessarily a party defendant. We have already stated our reasons for believing that the contrary holding of the *Williams* case is erroneous.

[10] The hearings held by that Committee have not been printed.

We submit, therefore, that the status of the Court of Claims as a constitutional court has been settled by the 1953 Act insofar as the period since the effective date of that statute is concerned, whatever may have been its status prior to that date. And, the same conclusion would seem to follow with respect to the Court of Customs and Patent Appeals after the enactment of the 1958 Act. This being so, there would not seem to be any substantial question about the validity of an assignment of a judge of these courts, after the enactment of the statutes in question, to serve on another constitutional court, or about the validity of an assignment of a judge of some other constitutional court to serve on either of the two courts.

Assuming (contrary to our firm view as set out in Part I hereof) that the Court of Claims was a legislative court prior to 1953 and that the 1953 Act changed it into a constitutional court, there is nothing in the Constitution of which we are aware that would compel reappointment of the judges of the Court of Claims or prevent the judges already appointed from continuing to serve. They already had lifetime tenure during good behavior, as required by Article III, and were originally appointed by the President and confirmed by the Senate, as required by section 2 of Article II. It is well established that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." *Shoemaker* v. *United States*, 147 U.S. 282, 301. The duties of the Court of Claims were not changed by the 1953 Act in any way that is material for present purposes. Even if it were a "legislative court" prior to 1953, this meant only that it was created under Article I rather than Article III of the Constitution, and not that it had no constitutional basis at all. While the Congress can no longer diminish the compensation paid to judges of the Court of Claims during their contin-

ance in office, the surrender of this right hardly suffices to require that incumbent judges again be nominated and confirmed. Certainly, neither the Congress nor the President has thought so.

We submit, therefore, that the declaration by the Congress in the 1953 Act that the Court of Claims is a constitutional court created under Article III should be given effect for the period since the enactment of that statute, even if the Court of Claims previously was a legislative court, so as to permit the temporary assignment of a judge of the Court of Claims to some other constitutional court and the temporary assignment to the Court of Claims of a judge appointed to another constitutional court.

Conclusion

While this case directly concerns the status of the Court of Customs and Patent Appeals, and of a judge thereof, the issues involved are of considerable significance to the Court of Claims and its judges. For the reasons stated above, we believe that the Court of Claims was created as a constitutional court and that the contrary decision in *Williams* should be overruled as wrongly decided. In any event, the status of the Court of Claims as a constitutional court during the period since the adoption by the Congress of the 1953 Act cannot be seriously questioned.

Respectfully submitted,

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